Ameliorative Mechanisms
“Education is a liberating force, and in our age it is also a democratising force, cutting across the barriers of caste and class, smoothing out inequalities imposed by birth and other circumstances.”

— Indira Gandhi
AMELIORATIVE MECHANISMS

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BLOCK 5  AMELIORATIVE MECHANISMS

This block discusses ameliorative mechanism available in South Asia.

**Unit 16** Deals with the domestic ameliorative mechanism of each South Asian country separately. When one refers national mechanisms, it requires a willingness or optimistic approach towards the international humanitarian laws to implement in their respective state.

**Unit 17** Talks about the role of ICRC in this connection. Which include promoting ratification of instruments dissemination of IHL in the Civil Society and armed and security forces etc.

**Unit 18** Deals with the role of UN High Commissioner of refugee (UNHCR). These include welfare of refugees, stress relative autonomy and humanitarian issues, strengthening Human rights regimes and institutions, preventing and unlawful detention etc. UNHCR’s primary purpose is to safeguard the rights and well being of refugees. UNHCR’s efforts are mandated by the organisation’s Statute. It followed by the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol. UNHCR offers protection and assistance to refugees and others in an impartial manner, on the basis of their need and irrespective of their race, religion, nationality, political opinion or gender.

**Unit 19** Deals with the role of other organization in this connection. Implementation of IHL may be carried out by the legal process by means of control and sanctions. *Military Law* plays an active role in prevention by dissemination, designing regulatory measures, and by framing of desired rules and orders to ensure respect and adherence to IHL.
UNIT 16 WHAT ARE THE NATIONAL AMELIORATIVE MECHANISMS?

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16.1 INTRODUCTION

When one refers national mechanisms, it requires a willingness or optimistic approach towards the international humanitarian laws to implement in their respective state.

So far as concern with SAC (South Asian Countries) the attitude of these countries is in question. The questions may by whether attitude of SAC towards IHL as reflected through adoption and enforcement of international conventions and protocols? Can a generalization be made for the whole region? What is the record of enforcement of IHL in these countries?
In this unit, we will discuss the concept of domestic ameliorative mechanisms, the mechanisms in very countries of South Asia, i.e. India, Bangladesh, Bhutan, Nepal and Pakistan. It will discuss about what is the attitude of the respective countries towards the IHL and their effects on the state.

16.2 OBJECTIVES

After reading this unit, you should be able to:

- explain the concept of domestic ameliorative mechanisms; and
- discuss the ameliorative mechanisms available in various South Asian countries.

16.3 THE CONCEPT OF DOMESTIC AMELIORATIVE MECHANISMS

To understand the enforceability of IHL in SAC, one has to look into the cultural and historical moorings of these countries, affecting their present day compliance with their principles.

As we know the countries in SA have a common culture and, Hinduism as the main religion. A just war should be conducted by righteous means under which the limits of war were well defined, i.e. the weapons to be used, area where it should be fought, treatment of combatants and non-combatants, etc. Now this approach towards IHL is deeply imbied in the Asian values, as a part of the cultural heritage, towards human life, which should be respected and valued even under adverse situations too.

All SAC have signed and ratified the Geneva Conventions (GC). But, almost countries have not signed the protocol to GC I and GC II, simply because it expands the ambit of the GC by creating additional obligations. However, except India, no other country in the region has legislated on any of the IHL conventions so far.

Geneva Conventions impose a large number of obligations on the parties to a conflict, international, and non-international. It is, therefore, necessary that the conventions should be internalized through law by all the SAC. Since the implementation of these GC in respective country, SAC facing one distinct problems, are, use and abuse of the emblem of the Red Cross as the distinctive sign of the medical services of armed forces. The misuse and abuse of the emblem is rampant in all the countries of South Asia.

In India, the Geneva Convention Act, 1960 seeks to prevent the abuse of the Red Cross and other emblems by prohibiting their use by any person without the approval of the central government. However, it merely provides five hundred rupees as fine and confiscation of the goods on which the emblem has been used in violation of the provisions of the Act.

Under the existing international instruments on IHL, there is, however, no legal obligation to create any national body to monitor, enforce, and promote humanitarian law in the country concern. In this direction, among the SAC, Sri Lanka is the first country, which, in March 2000, established a national humanitarian law committee at the initiative of its Ministry of Foreign Affairs.

We can say, SAC are in a pivotal position in the adherence to the principles of IHL because of their rich cultural heritage, which accord great value to human dignity in every adversity. By legislating the four GC through the 1960 Geneva Convention Act, and by giving due place to human rights principles in the constitution has shown its commitment to IHL, making these principles a part of the rule of law in the country.
We can say that India's participation in the drafting of the 1948 Genocide convention, the 1977 protocols Additional to GC-II, and the adoption of the statute of the International Criminal Court shows commitment towards the implementation of IHL. This sub-unit will discuss these major IHL conventions to implement IHL provisions in India.

16.4.1 Role of India in Drafting the Genocide Convention, 1948 to Implement the IHL

Around 20 states have signed the Genocide convention on 11 December 1948; India signed it on 29 November 1949. But India ratified the said convention on 27 August 1959, after around 10 years later to sign.

Focus of India at the time of signing of the convention 1948 was Jurisdiction, Definition of Genocide & liability of person.

India made the declaration while ratifying the convention that for the submission of any dispute in terms of the jurisdiction of the ICJ, the consent of all the parties to the dispute is required in each case.

In the beginning, India adhered to a 1945 agreement, establishing a tribunal for the trial of war criminals and a charter defining the tribunal’s jurisdiction and functions. The tribunal pronounced its jurisdiction on Germany’s violation of several treaties and convicted the offenders of the crime of planning and waging war. However, it could not find jurisdiction over crimes against humanity, as it could not be established that the acts complained of were ‘in execution of, or in connection with’, the war.

India, along with Cuba and Panama, sponsored resolution on genocide. It defined that genocide was a crime under international law and requested the ECOSOC to undertake the necessary studies with a view to drawing up a draft convention.

India mainly emphasised on the intention of the combatant, to define the ‘Genocide’. According to India, intent was closely linked to the act. India further focused to define ‘Genocide’ on the result. India said result must be the total or partial destruction of the group. Result could not be asserted. Further, India added that ‘the protection of the cultural right of groups should be assured by the declaration of human rights, which would shortly come before the General Assembly.

Further, to implement the IHL India supported the USSR amendment for deletion of the draft convention the reference to a penal tribunal. India emphasised that before the tribunal could begin to function, a host of complicated problems, such as jurisdictional conflicts between the national courts and the international tribunal, would have to be solved and a detailed convention drafted.

16.4.2 Implementation of Geneva Conventions, 1949

This is the second mechanism to implement IHL in India. It shows the commitment at international level to implementation of IHL in India. India was one of the sixty-three states which signed the final Act, incorporating the convention for the Amelioration of the condition of the wounded and sick in Armed Forces in the field, the convention for the Amelioration of the condition of the wounded sick and shipwrecked members of armed forces at sea, the convention related to the treatment of prisoners of war, and the convention relative to the protection of civilian persons in time of war.
16.4.3 Implementation of the GC in Court of India

We have to keep in mind the implementation scheme of GC in India. The Act does not give any special or direct remedy to the victims in GC Act, 1960. GC Act, 1960 does give indirect protection by providing for breaches of convention. The conventions are not made enforceable by Government against itself. Thus, there is only an obligation undertaken by the Government of India to respect the conventions regarding the treatment of civilian population. There is no right created in favour of protected persons.

Self Assessment Question

1) What is the role of India in drafting the Genocide Convention, 1948?

16.5 MECHANISMS IN BANGLADESH

As we know that one of the most important events in SA is emergence of Bangladesh as an independent state in 1970. It is very difficult to implement the international law at the domestic level in general and some time it is difficult to ascertain who, in the final analysis, has the responsibility of applying it.

16.5.1 Ratification of IHL Conventions in Bangladesh

Bangladesh is a 132nd High Contracting Party to the four Geneva Conventions of 1949 and has declared itself bound to them. The Bangladesh Government has also ratified the 1977 protocols Additional to Geneva Conventions.


16.5.2 Status and Implications of IHL in Bangladesh

If we observe the Bangladesh Constitution, it is silent on the status of international law upon the domestic legal regime. But we may find the provisions of human rights and respect of international law in the constitution of Bangladesh.

The general principle of the Bangladesh Constitution is in such a nature that, the principles of international law and the municipal legal regime, international treaties can become part of the domestic law in Bangladesh only if they are specifically incorporated into the law of the land.

The international treaties and protocols are not self-operating in Bangladesh. The Constitution of Bangladesh does not contain any specific provision, which obliges the state to enforce or implement international treaties and conventions including implementation and enforcement of IHL.
16.5.3 Obligation to Implement IHL Treaties in the State of Bangladesh

As we know that the primary responsibility lies with the state for application of IHL. So far as concern with the GC and Additional Protocol to GC respective state i.e. Bangladesh, have an obligation to ensure implementation of and respect for humanitarian law.

We have to keep in mind that adoption of international norms, rules, regulations or provisions in peace time, implementation is an administrative function at the national level, and, thus, as a state party to those different conventions and protocols, the government of Bangladesh has under the obligation to it.

16.5.3.1 Repression of Breaches of IHL

Generally, International Humanitarian Law lays down the principle of individual penal responsibility subject to the acts in question are punishable under national law. Now, so far as concern with the national provision of Bangladesh state, it has not enacted specific legislation to this effect. The only law that has some bearing is the International Crimes Tribunal Act, 1973. Problem arises at international platform in language. As we know that different countries has different languages. It is a duty of the High Contracting Party to translate the communication of IHL in to their language. So far as concern with Bangladesh, since independence, it has not experienced any hostilities.

16.5.3.2 Constitute an International Fact-finding Commission and IHL

This is one of the mechanisms in state of Bangladesh to implement the IHL. This mechanism refers to enable international implementation mechanisms to operate properly in the event of hostilities. There is no such time period for declaration. Generally, in practice, the appropriate time is before the need arises for an inquiry into a breach of humanitarian law.

The government of Bangladesh has not yet made any declaration.

16.5.3.3 Provisions of Bangladesh Constitution and Implementation of IHL

The preamble of the Bangladesh constitution have been made, which is indeed the basic objective of the IHL. We can find in the Art. 32, Bangladesh Constitution, guarantee against ‘grave breaches’. Art. 27 and 28 of the constitution are comprehensive enough to encompass the principles of IHL incorporated in the various Geneva Conventions, and the Additional Protocols. Art. 35, which provides certain safeguards ad protection to persons accused of crimes. But, one thing we have to emphasise that, those constitutional provisions does not directly provide for the implementation of IHL principles.

16.5.3.4 Domestic Laws and Implementation of IHL

The Bangladesh Government has passed Geneva Conventions Implementing Act 1936. This Act has been amended several times, and last it was amended in 1974. At initial time it was enacted on Article 36 of the GC. Subsequently, it was amended by Article 53, of First GC 1949.

Another, piece of legislation, which is the Bangladesh Red Cross Society Order, 1973, under which, Bangladesh Red Crescent Society was established. Main emphasised on Art. 4, and Art. 5 of the Act, which says society shall in all its activities, observe all seven objectives of IHL.
16.6 MECHANISMS IN BHUTAN

Let us see the provisions to implement of IHL in the state of Bhutan.

The office of Legal Affairs was established in March 2000. The responsibilities of the office include conduct of state prosecutions, drafting of legislation, and rendering of legal advice. It comprised a Legal Services Division which became the Ministry of Law and Justice with domestic, international, and human rights sections, and a prosecution division with a criminal and civil section.

Since, considerable rise in ethnic conflicts and separatist tendencies, it is underlining the importance of humanitarian law.

Let see few conventions which Bhutan has signed to implement the IHL in the state.

The ICRC plays a very vital role in Bhutan. Bhutan is a party to the GC 1949. But it is not a party to the protocols of 1977. Bhutan is also a party to the Biological weapons convention, 1972, and the chemical weapons convention 1993.

But, Bhutan has not ratified the cultural property convention, 1954, the environment Modification convention, 1977, the convention on conventional weapons, 1980, the Ottawa anti personnel landmines treaty, 1998, and the statute of the international criminal court, 1998.

Bhutan has not ratified the Mine Ban Treaty too.

16.6.1 National Legislations to Implementation of IHL

Bhutan has not enacted any national legislation to give effect to the GC domestically. Bhutan is not a signatory to the 1951 UN convention relating to the status of Refugees, or its protocol 1967. Since, there reorganization the right to asylum in according with international refugee law, it has no official policy on refugees, asylum, first asylum, or the non-return of refugees to countries in which they fear persecution.

Bhutan is a state party to the convention on the Rights of the Child, 1989. There are no recognized human rights non-governmental organizations in the country. The government...
regards human rights groups established by ethnic Nepalese exiles, the human rights organization of Bhutan, the people’s Forum for Human Rights in Bhutan, and Association of Human Rights Activists as political organizations and does not permit them to operate in the country.

**Self Assessment Question**

4) Give names of the conventions and treaties signed and ratified by State of Bhutan.

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<thead>
<tr>
<th>Convention/Treaty</th>
<th>Ratification Date</th>
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<tbody>
<tr>
<td>International Convention against the Recruitment, use, financing and training of mercenaries, 4 December 1989,</td>
<td>1989</td>
</tr>
<tr>
<td>Convention on the prohibition of the development, production, stockpiling, and use of chemical weapons and on their destruction, Paris, 13 January 1993,</td>
<td>1993</td>
</tr>
<tr>
<td>Protocol on blinding laser weapons (protocol iv to the 1980 convention), 13 October 1995, and protocol on prohibitions or restrictions on the use of mines, booby-traps, and other devices as amended on 3 May 1996.</td>
<td>1996</td>
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</table>

**16.7 MECHANISMS IN MALDIVES**

There has been an encouraging trend towards efforts to advance the cause of these humanitarian principles by ratifying some of the main IHL treaties.

However, these treaties have not been incorporated within the domestic laws, a huge step away from its effective implementation.

Maldives is a party to the four GC of 1949. Maldives is the only other state after Bangladesh, of South Asia to have signed two protocols. It is also a party to the convention on prohibition or restrictions on the use of certain conventional weapons.

**16.7.1 Ratified Conventions on IHL**

Maldives ratified the convention on the prohibition of the Use, Stockpiling, Production, and Transfer of Anti-personnel Mines and on Their Destruction 1998. But there is no report on the national implementation legislation or other measures. Maldives has supported to pro-ban United Nations General Assembly resolutions.

Maldives has ratified the protocol for the prohibition of the Use of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, Geneva 1925. Further, Maldives has ratified convention on the prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin weapons and on their destruction, convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects, Geneva, 10 October 1980, protocol on non-detectable fragments (protocol i), Geneva, October 1980, protocol on prohibitions or restrictions on the use of incendiary weapons (protocol iii), Geneva, 10 October 1980, international convention against the recruitment, use, financing and training of mercenaries, 4 December 1989, convention on the rights of the child, 20 November 1989, convention on the prohibition of the development, production, stockpiling, and use of chemical weapons and on their destruction, Paris, 13 January 1993, protocol on blinding laser weapons (protocol iv to the 1980 convention), 13 October 1995, and protocol on prohibitions or restrictions on the use of mines, booby-traps, and other devices as amended on 3 May 1996.

**16.7.2 Ratification of Convention and Protocol on the Rights of Child**

Ameliorative Mechanisms

one of the fundamental sources of Maldivian law and not recognizing the system of adoption and the laws of the Republic of Maldives stipulate that all Maldivians should be Muslims. The reservations to Articles 14 and 21 of the convention were reiterated upon ratification.

Maldives in May 2000 signed the optional protocol to the convention on the Rights of the Child, on the involvement of children in armed conflict. Maldives maintains only one security unit, the National Security Service (NSS). Its mission includes preserving security, and patrolling the country's territorial waters for illegal fishermen and smugglers.

Ratifications of IHL treaties are only initial stage. These international humanitarian law treaties need to be incorporated into the national legislation in the interest of Maldives and its citizens.

Unless IHL becomes incorporated into the municipal laws and made an integral part of military training at all levels of hierarchy, it would not have a favourable impact on the civilians as well as armed forces engaged in battle.

Thus, it is imperative for Maldives that legislative and practical measures be adopted, which would reflect the genuine intention in fulfilling their commitments as well as a positive message for other SAC.

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<th>Self Assessment Question</th>
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<tr>
<td>5) Mention the different treaties, signed and ratified by the state of Maldives.</td>
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16.8 MECHANISMS IN NEPAL

State of Nepal has incorporated the principles and guidelines in constitutions itself. The directive principles of the state, chapter four of the 1990, of the Kingdom of Nepal, have included the values of world peace of the foreign policy of Nepal. This policy is towards the neighbouring and other countries based on the principles of equality and cooperation.

Main purpose of the policy is to maintain the sovereignty, integrity, and independence of the country and thereby enhance the dignity of the nation.

If we look the constitution of Nepal, Article 126, the provision is related to ratification, accession, acceptance, or approval of a treaty, or an agreement. This article forbids the government from entering into treaties that can have adverse impact on the territorial integrity of the country.

Now, the provisions of Article 126, are regulated and elaborated upon by the Nepal Treaty Act, 1990. The Treaty Act stipulates that the provisions of the treaties duly ratified by Nepal prevail over the laws of Nepal in the event of conflict between the two.

With regard to the protection of fundamental rights, the Nepalese constitution incorporates most of the civil and political rights embodied in the International Bill of Rights. The constitution of Nepal also covers and empowered the judiciary to dispense
justice in accordance with, the ‘recognized principles of justice’, in enforcing the fundamental rights and freedoms guaranteed under the constitution. The Supreme Court has gone on to invoke international law principles in a number of cases when delivering its judgment.

Supreme Court of Nepal and IHL

Now, let us see the approach of the Supreme Court to implement of IHL principles through very well recognized case of Reena Bajracharya vs. HMG, where, Supreme Court of Nepal emphasized the importance of observing the provisions of international human rights instruments, particularly the convention on the political rights of women, 1952, The Universal Declaration of Human Rights, 1948, and, convention on the elimination of all forms of discrimination against women, 1979 (CEDAW). Supreme Court interpreted section 9 of the Nepal Treaty Act, 1990, which gives precedence to international law over municipal law. In this case, the right to equality guaranteed under the constitution and similar provisions of the CEDAW were invoked by the Supreme Court.

In another case, prakash Mani Sharma bhusal vs. HMG, the acquisition of the land surrounding a historical site, for development which would have resulted in the destruction of the cultural heritage was in dispute. The Supreme Court of Nepal invoked the convention on Natural and Cultural Heritage (CCH), 1972. Since Nepal is a party to CCH, the court ordered the government to protect the cultural heritage of Rani Pokhari (disputed place), citing its obligations and responsibilities under the CCH.

In Chandra Kanta Ganwali vs. HMG, the Supreme Court issued an order asking parliament to amend the provisions of section 3 (4) and (5), of the citizenship Act and Rule 3 (1), and Appendices 1 and 2 of the citizenship Rules, 1992 in order to make them compatible with the provisions of the constitution and those of CEDAW.

Nepal Red Cross (NRC) and implementation of IHL

Let us see the role of Red Cross of Nepal in implementation of principles of IHL.

Nepal is a party of the Geneva Red Cross Conventions 1949, since 1963, February. Now, ratification of this Red Cross Convention was the precondition for the recognition and establishment of Nepal Red Cross (NRC). As a consequence of this, in the month of September of 1963, NRC was established and got reorganisation from ICRC. The League of the Red Cross and Red Crescent Societies also supported the said establishment in Nepal in 1964. NRC helped Bhutanese Refugees too.

Now, we focus on role of NRC. Main function of the NRC is to promote international humanitarian law in the state. At present NRC is functioning in accordance with its constitution and is guided by the universally accepted seven principles of Red Cross and the tenets of international humanitarian law.

Implementation of IHL

As we know that Nepal is a party of GC 1949, though, it has not yet ratified the 1977 protocols to the GV, 1949. The very encouraging step taken by the government of Nepal is that, it has published the full text of the GC in Nepali, and introduced international humanitarian law to the Royal Nepalese Army’s training course, and organized training seminars with the help of ICRC.

Implementation of IHL by active participation of ICRC in the State of Nepal

The government of Nepal has allowed representatives of the Nepal Branch of the
ICRC to visit jails in different districts of Nepal and accepted confidential reports presented by the ICRC. It shows its commitment towards the implementation of humanitarian laws in the state.

Many treaties yet to be signed by the state of Nepal

The government of Nepal established a working group in 1985 to recommend on the measures necessary to ratify the 1977 protocols. However, in spite of the recommendations of the working group, Nepal has not yet ratified the protocols, nor has it ratified the UNESCO convention for the protection of cultural property in armed conflict, 1954; Ottawa treaty for banning of anti-personnel landmines of 1977; the rome statute of the international criminal court, 1998; the biological weapons convention 1972, environmental modification techniques convention of 1977; and conventional weapons convention and its protocols of 1980.

ICRC and State of Nepal

ICRC activities started with visits to detention centres. The visits later turned into full scale protection – oriented missions. The ICRC has been organising seminars for officers of the Royal Nepal Army and the police force with a view to making them aware of their rights and duties under international humanitarian law during conflict.

Domestic law in Nepal

Nepal does not have any specific legislation incorporating the GC into its domestic law. However, the provision of section 9 of the Nepal Treaty Act, 1991, implies that the provisions of international treaties ratified by Nepal have become part of domestic law and actually prevail over other laws.

A draft law for the protection of the emblem of Red Cross has been submitted to the authorities and the Supreme Court held in a case, Narayan Khadka vs HMG, that the government was under an obligation to protect the emblem. As a result of, the government issued a directive to all government hospitals, dispensaries, and other medical establishments to refrain from using the Red Cross emblem on their premises and other facilities, including, ambulances.

Grounds for slow progress of IHL regulations

Politicians are not fully familiar with the obligations of Nepal under international law.

Government ministers and officials do not seem to give priority to enacting a new law in this area due to the ongoing conflict within the country between the Maoist rebels and the security forces.

There is an absence of a national legislation, to this effect, concerned individuals and human rights campaigners have difficulty in holding the perpetrators of such violations to account.

Self Assessment Question

6) Discuss the role of NRC as a Mechanism to implement of IHL in the state of Nepal.
The national attitude of Pakistan towards the IHL is best measured by legislative developments, changes in law, and the treatment of IHL concepts in the legislation.

As we know, the basic law of Pakistan closest to regulating the armed conflict-related issues is the Pakistan Army Act. This law governs the entire army.

If we look into the Army Act, ‘combatant’ and ‘civilian’ define in one. But if see the definition of ‘enemy’, it includes all armed mutineers, armed rebels, armed rioters, pirates and any person in arms against whom it is the duty of any person, subject to this Act, to act. It seems, in fact, treated as de facto definition of ‘combatant’. Now, it is similar to the scope of one article, 43, of the 1977 protocol I, but, contrary to the protocol’s description.

The definition of ‘enemy’ is the same in substance in the Pakistan Air Force Act and also in the Pakistan Navy Ordinance.

If we see Article 8(1), of the of the Army Act, it defined to include persons attached, or forming part of a force, engaged in military operations, in the line of duty. This is closer to the protocol I description but it is more in the nature of determine the jurisdiction of the Act.

Care of Wounded and Sick

In this regard, war injuries ordinance, 1941 guarantees compensation to victims. Again, the War Injuries Compensation Insurance Act, 1943 makes it obligatory on all the employers to pay compensation in addition to the 1941 Act. Even under the 1943 Act, a war injuries compensation insurance fund was also established, similar section 7 of the Red Cross Society Act, 1920 also authorized the utilization of gifts, subscriptions, etc., for the relief of the sick or distressed due to the operation of war. The schedule to the Act provides for a clear preference for members of the Pakistan forces and includes such purposes as making essential supplies to hospitals, etc.

Legal and illegal commend by the official and implementation of IHL

If we observe section 33 of the Army Act, a soldier is liable to be punished if he disobeys a lawful command. The position is similar under the air force and naval laws and so is the case for Frontier Crops. Section 33 can be interpreted to mean that there will be no punishment under the Army Act, if soldier has disobeyed a command which is illegal. Again the Federal shariat court had quoted with approval in 1985, the incidence of a famous Muslim warrior, Khalid bin walled; whose command to kill certain prisoners was out rightly disobeyed and was subsequently receive with approval.

The concepts regarding clear distinction between combatants and non-combatants, military and civilian targets, preventions of indiscriminate attacks, adoption of the proportionality principle, protection of safe areas and humanitarian corridors, treatment of POWs, and principles regarding legal and illegal command need to be incorporated in existing or new laws and they should be adopted by courts as legally binding principles.

It is also required to be done regarding widespread dissemination of IHL, especially among the personnel of administrative, judicial, and legislative branches of the government, both at the national and international levels, in order to being the law to life.
16.10 SUMMARY

- In this unit, we discussed the attitude of different states of South Asian countries to implement the International Humanitarian Law. We saw the attitude and willingness of the state, by incorporating Humanitarian Laws into their domestic laws.

- We discussed the mechanisms in India to implement the provisions of International Humanitarian laws by emphasised on role in drafting the Genocide convention, 1948 to implement the IHL, by Implementation of Geneva Conventions 1949, by Implementation of the GC in Court of India as well.

- Further, we discussed the mechanisms in Bangladesh to implement rules of International Humanitarian Law, by Ratification of IHL Conventions in Bangladesh, Status and implications of IHL in Bangladesh, by implement IHL Treaties in the state of Bangladesh, Repression of Breaches of IHL, International Fact-Finding Commission and IHL, Provisions of Bangladesh Constitution and implementation of IHL, & by Domestic Laws and implementation of IHL.

- We examined the Provisions of IHL for implementation in the state of Bhutan too. We discussed conventions which Bhutan has signed to implement the IHL in the state, and also observed the National legislations to implementation of IHL.

- We also discussed the mechanisms in Maldives to implement the IHL. We was Ratified Conventions on IHL & protocols too. We discussed Ratification of Convention & Protocol on Right to Child.

- We saw the situation of Nepal too. We discussed Supreme Court of Nepal and IHL, Nepal Red Cross (nrc) and implementation of IHL, Implement of IHL by active participation of ICRC in the State of Nepal, ICRC & State of Nepal, Domestic law in Nepal, and Grounds for slow progress of IHL regulations.

- We saw the situation of Pakistan also. We saw legislations for Care of Wounded and Sick, Legal and illegal commend by the official and implementation of IHL too.

16.11 TERMINAL QUESTIONS

1) Discuss the role of Indian Court to implement IHL.

2) Discuss the National Mechanism of Bhutan, Maldives, Nepal, Sri Lanka, Bangladesh, and Pakistan relating to the implementation of IHL Conventions.

16.12 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Sub-section 16.4.7

2) Refer to Sub-section 16.5.1

3) Refer to Sub-section 16.5.3

4) Refer to Section 16.6

5) Refer to Section 16.7

6) Refer to Section 16.8
16.13 GLOSSARY

**Combatant**: Includes all armed mutineers, armed rebels, armed rioters, pirates, and any person in arms against whom it is the duty of any person, subject to the Act.

**Wounded and sick**: According to the Geneva Convention, 1949, define as who becomes wounded during the armed conflict.

16.14 REFERENCES AND SUGGESTED READINGS

1) Four Geneva Conventions 1949
2) Protocols to Geneva Conventions 1977
3) Constitution provisions of very countries
4) Introduction to ICRC
UNIT 17 WHAT IS THE ROLE OF INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC)?

Structure
17.1 Introduction
17.2 Objectives
17.3 Promoting Ratification of Instruments
17.4 National Implementation of IHL
17.5 Role of National Committees or Working Groups on IHL
17.6 Dissemination of IHL in Civil Society
17.7 Dissemination of IHL to Arm and Security Forces
17.8 Summary
17.9 Terminal Questions
17.10 Answers and Hints
17.11 References and Suggested Readings

17.1 INTRODUCTION

International Humanitarian Law comprises of a fairly significant number of international instruments. One of the greatest challenges for humanitarian law today is ensuring compliance with its rules and principles.

If we look humanitarian rules in matter of practice, the law itself is not well developed with respect to the promotion of compliance as it is with respect to the prescription of rules for the protection of war victims. Only the thing is the willingness of the ratified parties is required to implement the regulations of humanitarian laws.

As we know the close-knit association between the ICRC and IHL right from the very establishment of the ICRC. Thus, promotion of international humanitarian law, the very source of its mandate, befalls on the ICRC.

17.2 OBJECTIVES

After reading this unit, you should be able to:

- discuss the role of ICRC in promoting the ratification of IHL treaties;
- describe the contribution of ICRC in the dissemination of IHL in civil society and armed forces; and
- evaluate the role of ICRC in promoting the national implementation of IHL treaties.
In the South Asian region, the ICRC has been facilitating implementation, ratification, and dissemination of international humanitarian law instruments.

Generally, these activities are conducted under the auspices of the ICRC's Advisory service on International Humanitarian Law. The advisory service, which has been integrated into the overall structure of the ICRC, both at the headquarters and in the field, became fully operational in 1996.

The purpose is to assist civilian and military authorities in the implementation of humanitarian law and to promote universal acceptance of humanitarian law instruments.

The service provides technical assistance, i.e., translating the Geneva Conventions and their Protocols into national languages, incorporating international humanitarian law into national law, enacting legislation to ensure that war crimes are prosecuted and punished and establishing national information bureaux.

The provisions of international instruments are taken seriously, give due respect, and they form the basis for subsequent legal developments as well. Those provisions may also gain the status of customary international law, and undoubtedly Geneva Convention fall into this category only.

As we know, attaining universal acceptance is a long and steady process, and also possible to facilitate universalization of an international instrument.

The ICRC has taken up the task of facilitating universalization of IHL instruments since this will undoubtedly expand the safety net of humanitarian law so that there is greater and better protection to victims of wars and armed conflicts.

The ICRC considers it important to involve the civil society in the process of facilitating ratification of international humanitarian law instruments. A number of such activities were organized by the ICRC in various countries of South Asia on issues like the additional protocols of 1977, the Hague Convention on cultural property of 1954, anti-personnel landmines and International Criminal Court. Such events are usually organized by the ICRC in close collaboration with national red cross and red crescent societies or academic institutions.

When issues concerning ratification or accession to humanitarian law instruments are taken up by the advisory service with governmental authorities, the latter's responses vary among the positions, like, that the government has considered the instrument but is reluctant to become a state party—at least for the time being—in view of certain provisions of the instrument which are not acceptable for certain specific reasons.

Another response, like, the government has not considered the instrument but will look into it and come up with a decision whether or not to become a state party.

The main function of ICRC in this is to provide services. A number of states in the South Asian region have become states party to certain international humanitarian law instruments and some ratifications are on the way.

17.4 NATIONAL IMPLEMENTATION OF IHL

Obviously, one of the major responsibilities entrusted to the Advisory Service is to ensure appropriate national implementation of international humanitarian law instruments by the states party.
There are various instruments envisage different types of measures which states party are obliged to adopt to fulfil obligations under them.

For example, to adopt legislation to punish grave breaches of the Geneva Conventions and Additional protocol I of 1977; this is obvious that those where it is applicable. Another obligation we can say, to protect the proper use of the Red Cross and Red Crescent emblems; to define and guarantee the status of protected persons, to ensure fundamental guarantees of humane treatment and due legal process in times of armed conflict, to disseminate humanitarian law as widely as possible, to train and appoint personnel qualified in humanitarian law including legal advisers within the armed forces and to ensure that protected sites are properly situated and marked.

The ICRC also has been discussing issues concerning national implementation with the authorities of various states in the South Asian region.

The ICRC deems it expedient to study the existing national legislation of a given country to find out to what extent existing international humanitarian law obligations have already been implemented through national legislation, what legal mechanisms are followed to incorporate international legal obligations in the domestic legal system, and whether the measures adopted so far are adequate or not.

Such national study enables the ICRC to decide upon a plan of action.

The another usual modalities of dealing with these issues may be, where national legislation to make grave breaches and other violations of the Geneva Conventions and Additional Protocols has not been adopted, the ICRC requests the authorities to take steps in that direction.

Now, upon request, the ICRC, also provides draft model legislation, copies of other countries’ legislations, literature on international humanitarian law instruments, etc.

The role of Advisory Service also provides support to states in the process of adoption of national legislations under other humanitarian law treaties, such as the Ottawa Treaty banning anti-personnel landmines.

Now, another step that ICRC is initiating is to organize events on concerning national implementation. Very often these are discussed by organizing a round-table of representatives of different ministers and governmental departments associated with international humanitarian law issues.

Obvious, the main objective is that, it may useful for both the authorities as well as to the ICRC.

Self Assessment Question

1) What is the role of ICRC, to implement humanitarian law in the State?
17.5 ROLE OF NATIONAL COMMITTEES OR WORKING GROUPS ON IHL

Now, we discuss the role of very different committees or any working groups in implementation of IHL in the state.

The main role of those working groups or other committees is to implementation, dissemination, and promoting ratification of international humanitarian law instruments. Generally, it is an ongoing process for them. It encompasses a wide range of efforts, which involves many very different fields of government activities and numerous sectors of public life.

There is no doubt, that to complete this job, it requires the coordination and cooperation of various ministries, government administrative departments, state bodies, public service establishments, and other national institutions.

Now, some states have set up special bodies such as national committees, or inter-ministerial working groups on international humanitarian law. Their functions are specifically defined in terms of promoting humanitarian law. Generally, their objective is to advise and assist governments on matters pertaining to participation in the humanitarian treaties, adoption of measures for their implementation, and dissemination of their provisions.

There is no doubt that there is no legal obligation to set up such bodies, their creation has been recognized as an important step towards the effective application of humanitarian law.

There is no doubt that since beginning, there has been an effort in the sphere of implementation of IHL in the nation.

We can say toward the South Asian countries that, some positive developments are taking place. i.e Sri Lanka established national humanitarian law committee in March 2000. The main task was of the Ministry of Foreign Affairs behind this set up.

The ICRC has also discussed the possibility of establishing such bodies in Bangladesh, India and Nepal too.

The ICRC has strongly encouraged the establishment of committees, or other bodies as internal mechanisms to ensure the effective implementation of humanitarian law.

We will discuss the role of the other organizations to implement IHL in the next Unit, where we discuss in detail.

Self Assessment Question

2) What is the role of ICRC to establish committees or working groups in the state?

17.6 DISSEMINATION OF IHL IN CIVIL SOCIETY

As soon the state ratified the four Geneva Conventions 1949, it is an obligation to the
State party to disseminate the content of their humanitarian treaties as widely as possible in their state or country.

The emphasized, obvious, is on military. Military instruction is indispensable to ensure their implementation in times of armed conflict. No doubt, it is equally important to promote knowledge of humanitarian law among those whom it is intended to protect - the civil population as well as among those who have to apply it, such as the public officials of various ministries.

When we say about civil society, political leaders, and decision makers must also be familiar with that law, so that they are aware of its relevance, realism, and mode of operation if and when a conflict should break out.

**Education and IHL**

As we all know, that higher education in most of the South Asian countries is based on the British system. The students can join the professional courses, generally, after passing the standard twelfth. The important thing in the SAC is that educational planners have by and large agreed to include international humanitarian law in Law and Political Science and in Law. Most of the Indian universities have included international humanitarian law components in their undergraduate LL.B. programme, postgraduate courses, and postgraduate diploma as well as Masters’ course in human rights.

About thirty universities offer postgraduate courses in international law.

**State of Pakistan and IHL**

International humanitarian law is taught primarily within law faculties and departments of international relations. The University Grants Commission of Pakistan has shown interest in the inclusion of international humanitarian law modules in undergraduate professional law courses.

**State of Sri Lanka and IHL**

The University of Colombo offers a full postgraduate course in international humanitarian law for law graduates. In addition, the undergraduate international law course contains a brief module on international humanitarian law.

**The ICRC and its endeavour in implementation of IHL**

As we know, ICRC is organising regularly South Asian Teaching Session on international humanitarian law for post-graduate students, and young university lecturers.

ICRC is fully supporting in research and publication field. ICRC publishes journals on international humanitarian law in collaboration with Indian Society on International Humanitarian Law.

Regularly, ICRC is organising academic events on international humanitarian law, such as the ICC, Anti-personnel Landmines, etc.

**Internships etc. by ICRC**

ICRC accepts the students for internships. The ICRC established a documentation centre in its premises, supports libraries of academic institutions by providing publications on international humanitarian law, holds moot court and essay-writing competitions, and arranges other promotional events too.
ICRC, regularly organizes training programmes in international humanitarian law for academic staff training law, international relations, human rights, etc.

**Self Assessment Question**

3) Discuss the role of ICRC in promoting IHL in academic institutions in South Asia.

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**17.7 DISSEMINATION OF IHL TO ARM AND SECURITY FORCES**

As we know, it is essential that international humanitarian law should be known by those who will be called upon to apply it, i.e., Combatants

By virtue of being a party, the obligations are fulfilled by putting them in practice. Training members of armed forces in humanitarian law in peacetime is absolutely indispensable to ensure that as and when they are involved in an armed conflict they already know what humanitarian law norms they are expected to respect.

It is equally important to impress upon them that they shall be held accountable individually in case of failure to adhere to humanitarian law norms.

By virtue of provisions in GC and AP, it is the responsibility of states parties to include the study thereof in their programme of military instruction.

It is obvious that the international community has entrusted a responsibility to the ICRC to help the states parties in fulfilling this obligation under humanitarian law.

Since 1995, the ICRC dissemination activities for armed and security forces in South Asia is recognized. After having established formal contacts with institutions imparting military training in the region, the ICRC embarked upon a programme of dissemination and training for armed, paramilitary, and police forces.

The ICRC has already been assisting the authorities in developing and producing training syllabi for the various levels of military instruction. This is also complemented by production of audio-visual and written material on humanitarian law especially designed for use in military instruction.

**ICRC in Internal Armed Conflict**

In an internal armed conflict or strife this means addressing the rebel groups which are fighting with the government forces. They must also know what restraints they ought to follow in the course of their fight against the state. For example, in Sri Lanka, the ICRC has been regularly conducting training in humanitarian law for various cadres of the liberation tigers of Tamil Eelam. The ICRC is convinced that the programme of dissemination and training in humanitarian law for members of armed, paramilitary, and police as well as the non-state actors is bound to enhance greater respect for humanitarian law on the part of combatants and authorities.

**Finally, we can say**, promoting IHL is an arduous task. An organization like the ICRC
can only facilitate this process, that too if the authorities of the states concerned are wholeheartedly willing to act in a spirit of cooperation with the ICRC. The ICRC has, in accordance with the mandate entrusted to it by the international community, taken a number of steps to facilitate this process on different fronts and at different levels in South Asia. Dissemination of humanitarian law in civil society, to political authorities, to members of armed, and security forces is one such step.

The Advisory Service’s programme and activities for facilitating national implementation of international humanitarian law and encouraging ratification of, or accession to, humanitarian law instruments has contributed to promotion of international humanitarian law.

### Self Assessment Question

4) Discuss the role of ICRC in Dissemination of Information about IHL.

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### 17.8 SUMMARY

- ICRC and the IHL are the two sides of one coin. The role of ICRC is to disseminate the principles of IHL.

- This unit also discussed the role of ICRC in promoting the ratification of the Four Geneva Conventions of 1949, their Protocols of 1977, and other instruments which protect the IHL. We saw, "important to involve the civil society" in the process of facilitating ratification of international humanitarian law instruments.

- This unit also touched upon the national implementation of IHL, and the active participation of ICRC into it. Obviously, one of the major responsibilities entrusted to the Advisory Service is to ensure appropriate national implementation of international humanitarian law instruments by the state party. There are various instruments envisage different types of measures which states party are obliged to adopt to fulfill obligations under them.

- This unit also covered the role of national committees and other working groups to implement the IHL provisions in the state.

- One of the important roles of ICRC is to dissemination of IHL in the civil society. We discussed that it is equally important to impart the knowledge to the civilians.

- One of the major contributions of ICRC is dissemination of IHL in Armed conflicts and security forces. It is also important to provide knowledge, actually who implement in practically.

### 17.9 TERMINAL QUESTIONS

1) How ICRC plays role in dissemination of IHL in civil societies?

2) Discuss the role of ICRC in promoting National Implementation of IHL.
17.10 ANSWERS AND HINTS

Self Assessment Question

1) Refer to Section 17.4
2) Refer to Section 17.5
3) Refer to Section 17.6
4) Refer to Section 17.7

Terminal Questions

1) Refer to Section 17.6
2) Refer to Section 17.3, 17.4 and 17.5

17.11 GLOSSARY

Dissemination means propagation.

17.12 REFERENCES AND SUGGESTED READINGS

1) Promotions of International Humanitarian Law in South Asia
UNIT 18 WHAT IS THE ROLE OF UNITED NATIONS HIGH COMMISSIONER OF REFUGEE (UNHCR)?

Structure
18.1 Introduction
18.2 Objectives
18.3 Welfare of Refugees and UNHCR
18.4 UNHCR and Stress-Relative Autonomy of Humanitarian Issues
18.5 Strengthening Human Rights Regimes and Institutions
18.6 National Refugee Regimes: A Need
18.7 Role of UNHCR in Preventing Unlawful Detention
18.8 Minimum Standards of Material Assistance and other Rights
18.9 Focus on other Solutions by UNHCR
18.10 Making UNHCR Responsible in Law
18.11 Summary
18.12 Terminal Questions
18.13 Answers and Hints
18.14 Glossary

18.1 INTRODUCTION

If we think current decades, Asia, has been a munificent host to millions of refugees. Yet, the human condition of refugees in the region is far from supreme.

UNHCR's primary purpose is to safeguard the rights and well being of refugees.

UNHCR’s efforts are mandated by the organisation’s Statute.


UNHCR offers protection and assistance to refugees and others in an impartial manner, on the basis of their need and irrespective of their race, religion, nationality, political opinion or gender.

Now, we examine the principle of non refoulement.

The principle of non refoulement is not always respected. Detention is a reality of life. The camps in which refugees are hosted often lack basic amenities. And, the right to education and employment are available only to some refugee groups.

In brief, refugees in the region are not given the opportunity to live and reconstruct their lives with dignity.
A comprehensive approach at the regional level is not feasible, it is not altogether difficult to identify the common problems, which prevent more humane and rights-based treatment of refugees.

We propose to identify these problems and make a set of recommendations.

These inter alia include establishing national legal regimes on the status of refugees, emphasizing durable solutions other than voluntary repatriation, addressing the problem of statelessness, stressing the need for international burden sharing, and making the UNHCR responsible in law for its acts of omission and commission.

However, I would like to begin by delineating, albeit briefly, the governing idea of inter-state relations in the matrix of which refugee issues are addressed in the region, including the particular concerns of post-colonial states.

But, there are ways of improving the human condition of refugees in Asia. UNHCR’s approach towards the Asia is crucial.

**We discuss,** ways of improving the human condition of refugees in Asia and the role of UNHCR in South Asia.

### 18.2 OBJECTIVES

After reading this unit, you should be able to:

- discuss the main Approach of South Asian States to the refugee problem;
- describe the Human Rights Regimes and institutions; and
- evaluate the role of UNHCR for welfare of Refugees.

### 18.3 WELFARE OF REFUGEES AND UNHCR

UNHCR’s programmes, its protection and other policy guidelines, are approved by an Executive Committee of 72 member states which meets annually in Geneva.

A second ‘working group’ or Standing Committee meets several times a year. The High Commissioner reports on the results of the agency’s work annually to the UN General Assembly and the Economic and Social Council.

As we know the governing paradigm of inter-state relations in the region is known worldwide by the name of political realism.

Let us identify four of its features that have direct relevance to the status and welfare of refugees.

**First,** it sees international politics as ‘a struggle for power’; indeed, power doubles as both means and end. Morality has, only a marginal bearing on the conduct of foreign policy. Instead, refugees are most often seen as a resource, or a bargaining chip, to secure ‘national interests’. Therefore, the final determinant of the fate of refugees is not their concerns and problems but the role that they can play in enhancing the power of the host state.

**Second,** it examines all issues in the matrix of an omnibus concept of ‘national security’. This cause state policy to be particularly suspicious of all alien groups present on its territory.
Those given refuge are expected to be satisfied with the assistance provided and to return home as soon as the host state decides.

Third, the overwhelming concern with enhancing ‘power’ makes states ‘wary of accession to international instruments on human rights for fear of accountability at the international level’. When states do sign these instruments, ‘human rights considerations are secondary to political expediency’. It follows that membership of humanitarian organizations is often used to pursue the power agenda.

Thus, we can say, the membership of the Executive Committee of the UNHCR does not necessarily mean for Bangladesh, India, Pakistan, and Thailand the pursuit of the welfare of refugees in the region but the securing of its geopolitical interests.

Forth, the paranoia the realist approach engenders makes states limit the interaction of civil society with refugees.

Thus, states often deny non-governmental organizations access to refugee camps, as they are worried about the impact of any negative reporting on its international image.

Self Assessment Question

1) What are the guiding principles of UNHCR?

As a humanitarian, non-political organisation, UNHCR has two basic and closely related aims – to protect refugees and to seek ways to help them restart their lives in a normal environment.

International protection is the cornerstone of UNHCR’s work. In practice that means ensuring respect for a refugee’s basic human rights and ensuring that no person will be returned involuntarily to a country where he or she has reason to fear persecution.

The word “protection” has a very specific meaning for UNHCR. It includes material and other assistance to refugees, so that basic needs are met. It includes ensuring that refugees are able to avail their rights. It includes the three durable (long-term) solutions – voluntary repatriation, local integration and resettlement (discussed in detail later). Guided by the Universal Declaration of Human Rights (1948), the 1951 Convention and its Protocol, and bolstered by internal initiatives such as the Agenda for Protection, UNHCR carries out its mandate of protection in a manner that reflects changing global reality.

The substance of UNHCR protection, including the groups of people:

Questions generally arise, and UNHCR oblige to reply. We will discuss these questions here.

What rights does a refugee have? And what is a role of UNHCR?
In certain circumstances when adequate government resources are not immediately available, including the sudden arrival of large numbers of uprooted persons, UNHCR and other international organisations provide assistance such as financial grants, food, tools and shelter, schools and clinics. With projects such as income generating activities and skills training programs, UNHCR makes every effort to ensure that refugees become self-sufficient as quickly as possible.

**How are refugees protected? And what is a role of UNHCR?**

Governments normally guarantee the basic human rights and physical security of their citizens. But when civilians become refugees this safety net disappears. UNHCR’s main role in pursuing international protection is to ensure that states are aware of, and act on, their obligations to protect refugees and persons seeking asylum. However, it is not a supranational organisation and cannot be considered as a substitute for government responsibility.

Countries should not forcibly return refugees to a territory where they face danger or discriminate between groups of refugees.

**Who decides who is a refugee? And what is a role of UNHCR?**

Governments establish status determination procedures to decide a person’s legal standing and rights in accordance to their own legal systems based on international criteria. UNHCR may offer advice as part of its mandate to promote refugee law, protect refugees and supervise the implementation of the 1951 Refugee Convention. The agency advocates that governments adopt a rapid, flexible and liberal process, recognising how difficult it often is to document persecution. UNHCR’s Executive Committee sets non-binding guidelines and the agency’s “Handbook on Procedures and Criteria for Determining Refugee Status” is an authoritative interpretation of the 1951 Convention. In countries which are not party to international refugee instruments but who request UNHCR’s assistance, the agency may determine a person’s refugee status under its mandate and offer its protection and assistance.

**Are there asylum guidelines on stowaways or people rescued at sea? What UNHCR says?**

There is no binding international convention relating to stowaway asylum seekers and their reception varies widely. UNHCR advocates that, wherever possible, stowaways should be allowed to disembark at the first port of call, where their refugee status may be determined by the local authorities. If a port state does not allow a stowaway to disembark, and the ship’s next port of call is in a state where the stowaway’s life is threatened, then the action is tantamount to forcible return (refoulement).

In this regard, there needs to be concerted action by individuals concerned, NGOs, and the UNHCR to drive home the point that humanitarian issues should be given their proper place in the domestic and foreign policies of states.

**Self Assessment Question**

2) What are the two basic aims of UNHCR?
18.5 STRENGTHENING HUMAN RIGHTS REGIMES AND INSTITUTIONS

UNHCR alone could not meet the goals.

It requires the assistance of the other body or agency, who works on the humanitarian issues and the ideology.

There are independent human rights institutions, both at the governmental and non-governmental levels to take up their concerns.

Thus, for example, the National Human Rights Commission of India took up in 1995 the cases of 65,000 “Chakma” refugees settled in Arunachal Pradesh in India since 1965 and successfully sought the intervention of the supreme court of India to safeguard their life and freedom.

In deciding that, it was the duty of the state of AP to protect the life and liberty of the “Chakma” refugees’ the Supreme Court did not give any weight to the argument that the settlement of such large numbers of them would disturb ‘it’s ethnic balance and destroy its culture and identity’.

The Supreme Court unequivocally affirmed that ‘the state is bound to protect the life and liberty of every human being, be he a citizen or otherwise’.

And at last, there is a need for the international community to devise policies which help to combat poverty and institutionalize the principle of burden-sharing, a point to which we shall return later.

Self Assessment Question

3) Discuss the role of Human Rights Institution for strengthening the UNHCR.

18.6 NATIONAL REFUGEE REGIMES: A NEED

Local Integration

For refugees who are unable to return to their home country or those who have stayed for years in the host country (country of asylum) local integration is an appropriate durable solution. In some situations, it is a permanent solution that is when refugees become naturalised citizens of the host country.

Local integration can be broken into three steps:

First, it is a legal process where refugees are granted a progressively wider range of rights and entitlements by the host state similar to those enjoyed by its citizens. Second, local integration is an economic process where refugees become progressively less reliant on state aid/humanitarian aid, becoming self reliant and being able to contribute to the economy of the host country. In many countries, UNHCR helps refugees to become self reliant by providing vocational skills training, job placements and so on.
Third, local integration is a social and cultural process that enables refugees to live amongst the local host population without discrimination where they can then contribute actively to the social life of the host country.

Let get one clarification that, the status of refugees in these South Asian countries is precarious. More often than not, it is subject to executive discretion, bolstered by claims of national security and foreign policy considerations. Law for the protection of refugees is the exception rather than the rule in the majority of Asian Countries.

As a result of above, despite Asia having been host to hundreds and thousands of refugees there is the absence of any formal legal regime. Refugees’ issues are dealt with at the political and administrative levels. The absence of national legal regimes poses a major obstacle to improving the human condition of refugees. As ‘Muntarborn’ notes, ‘A perennial problem facing all asylum-seekers in the region has been uncertainty of their rights upon arrival, pending the search for long-term solutions.’

Another example. Thailand has no domestic legislation covering the treatment of refugees. The 1979 immigration Act is the only relevance piece of legislation, and under this law all undocumented asylum-seekers are considered ‘illegal immigrants’ and liable to summary deportation. Appeals by asylum-seekers against deportation are rare since, although such appeals can generally be made to the Ministry of Interior, they are not allowed in the case of those without passports, equivalent identification documents, or visas.

While legal regime does not necessarily ensure that refugees secure the conditions in which they can reconstruct their lives with dignity, and is not a precondition for the expression of solidarity. Its lake can become a serious hurdle in the pursuit of a favourable environment.

For example, in the absence f the right of refugees to refuse to be repatriated, the state can easily substitute its own decision for that of the refugee. In implementing the rights of refugees the refugee community must be consulted at all states’ refugee representation should be required in all decisions, which crucially affect their lives.

1951 convention: need for constructive linkage

The passage of national laws can be secured only through a campaign which, as earlier stressed, emphasizes the distinctive essence of humanitarian problems.

However, be confused with the separate question of persuading states to become part to the 1951 convention, or the 1967 protocol.

No country in Asia, other than Cambodia, china, Japan and Philippines, is party to the 1951 convention, or the 1967 protocol.

In my view, any talk of accession to the 1951 convention or the 1967 protocol should be linked to the withdrawal of the non entrée regime established by the affluent north.

That is to say, the countries of the region should collectively argue that they would consider acceding to the convention or protocol only if the western world was willing to withdraw those measures which violate the principle of burden sharing and instead practice burden shifting.

Asian members states of the Executive Committee of the UNHCR must make this case in that forum to place in perspective the refusal of states in the region to become parties to the existing international instruments.
Principle of Non-Refoulement: Non-Rejection at the Frontiers and Ratification of CAT

One of the problems that identified is that, border guards and officials are trained essentially to turn people back rather than accept their explanation for presenting themselves without proper papers. It is therefore important that any domestic legislation on the subject ensures that the principle of non-refoulement include non-rejection at the frontiers. There is a precedent in this regard in the Bangkok principles adopted by the Asian African Legal Consultative Committee in 1966.

There is also need for the countries in the region to ratify the convention against torture for it offers a wider legal basis for respecting the principle of non-refoulement.

As of May 1998 only six Asian countries had become party to it.

Self Assessment Question

4) Discuss the needs for the local integration of refugees.

18.7 ROLE OF UNHCR IN PREVENTING UNLAWFUL DETENTION

In 1986, the Executive Committee of the UNHCR adopted conclusion No. 44 that clarifies the situations in which detention may be deemed appropriate:

If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel or identity documents, or have used fraudulent documents in order to mislead the authorities of the state in which they intend to claim asylum; or to protect national security, or public order.

This understanding should be included in any national law on the status of refugees. It may be added that international human rights law goes much further in offering protection against arbitrary arrest and detection.

Under human rights law, as Goodwin-gill has pointed out, 'arbitrary embraces not only what is illegal, but also what is unjust'.

In the case of mass influx of refugees a key question is whether keeping refugees in closed or restricted camp conditions amounts to detention.

While much would appear to depend upon the circumstances of the particular case and the nature of the restrictions which have been imposed on the freedom of movement of refugees, the keeping of refugees in camps should in general be avoided, other than for reasons of national security.
18.8 MINIMUM STANDARDS OF MATERIAL ASSISTANCE AND OTHER RIGHTS

Yes, one of the problems in giving meaning to the rights of refugees in the region is the arbitrary determination of what constitutes minimum material assistance which should be provided to refugees.

Consequently, the fate of refugees can differ even within the same country with one refugee group getting better treatment than another group. Without being entirely insensitive to the general standard of living of the local population, there needs to be some effort at defining at the governmental level the material assistance which must be given to all refugee groups.

An issue is the extent to which certain assistance and facilities made available to refugees could also be accessed by the local populace. It is usual in a poor country to hear the complaint that refugees are using resources meant for nationals of the country. For example, despite that fact that Bihari refugees in Bangladesh live below sub-human levels it is said that their care ‘puts an enormous burden on Bangladesh economy’.

Likewise, in the instance of Rohingya refugees in Bangladesh, the local people have expressed their dissatisfaction over the refugee day labourers whose presence and involvement almost halved labourers’ salaries in the region and called for their repatriation.

These sentiments are reflected in most countries of the region.

If this problem can be dealt with it would raise the possibility of states in the region to lift the prohibition on refugees taking up employment in the host state.

At present, nearly all states do not allow refugees the right to employment.

This prohibition greatly reduces the chances of refugees to escape the syndrome of dependence on external agencies, which often encourage the situation for their own ends.

Providing access to camps

A key problem in the region relates to the frequent denial of access to camps to NGOs and the UNHCR.

Some countries like India deny access to both to refugee camps.

Others do so from time to time depending on the political perception of the refugee problem. While a country may have legitimate concerns that motivated NGOs and states may indulge in disinformation to embarrass it before the international community, the problem can be handled through establishing more effective communicative channels and diplomacy.

Self Assessment Question

5) What are the minimum standards of material assistances of UNHCR?

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Special problems of refugee women

No state in the region has addressed the concerns of women and children refugees. The result is often a complete insensitivity towards their special concerns.

For example, as has been pointed out in the case of Afghan refugees in Pakistan, women have suffered much more than any other group due to their identity as women, both at the hands of the state and donor agencies policies and of their own men at the family level.

Ranging from the right to make decisions about their own lives to personal security, to the right of education a deployment have all eroded the case of Afghan women.

The organizational structure of camps, the conservative ideologies of those who dominate the politics of Afghan refugees, and the overall environment in which cold war politics dictated refuge politic, have all contributed to the oppression of Afghan refugee women.

This situation prevails despite fact that a range of international human rights instruments prohibit discrimination against women and the UNHCR has issued guideline which focus on how to best protect and assist refugee women. These provisions need to be integrated into the official refugee policy, and in some form, the proposed national law dealing with the status and rights of refugees.

Refugee children

Refugee children are confronted with a range of distinct problems, especially in relation to the registration of their birth, the security of their person, and education.

Nearly all countries in the region are parties to the convention on the Rights of Child, 1989 (CRC), which contains a special provision on the refugee child (Article 22).

Yet, there is little done at the level of implementation with particular reference to the refugee child. To take the example of Afghan refugee children in Pakistan, “their special needs and rights have not received much attention from Pakistani policy makers”.

It is also crucial to remove threats to the security of the person of the child and guarantee the right of children to education, adequate food, and the highest attainable standard of health. These are rarely ensured.

In 1997, UNHCR Executive Committee adopted conclusion No. 84 (XLVIII), which, listed some of these measures. These should be given serious consideration by states in the region.

Environmental degradation

One of the concerns that host states have is the environmental degradation, which results from the activities of refugees. The concern is real and needs to be addressed. In this regard the national law can place certain duties on the local administration, aid agencies, and on the refugee community.

Often simple measures can avoid causing harm to the environment. For example, in Bangladesh the UNHCR has distributed compressed rice husks as cooking fuel to all families in the refugee camps in order to minimize the collection of firewood and militate against deforestation around the camps.

Since 1996, kerosene used for the ignition of the compressed rice husks is also being
distributed to refugee families, to ensure that they do not need to collect firewood for this purpose.

**Voluntary repatriation**

Voluntary repatriation is normally a refugee’s preferred long-term solution. Most refugees prefer to and do return home as soon as circumstances permit, generally when a conflict has ended, a degree of stability has been restored and basic infrastructure is being rebuilt. In such conditions, UNHCR encourages voluntary return by providing transportation, material incentives and practical help such as seeds, farming equipment and building materials. When quick impact projects (QIPs) are approved, they are designed not only to help returning refugees, but also members of local communities which, in developing countries, are often as poor and deprived as the returnees themselves.

The decision to return home (repatriate) is entirely the refugee's. UNHCR shares information about the conditions in the country of origin - i.e., the place where the refugee is returning to, so that the decision to return is an informed one. In any repatriation operation, UNHCR has the following role:

Verify the voluntary character of refugee repatriation. (That is, to make sure that the refugee is not being forced or threatened to return, that the decision is not made under duress)

- Promote the creation of conditions that are conducive to voluntary return in safety and with dignity
- Promote voluntary repatriation once conditions are conducive to return
- Facilitate the voluntary return of refugees when it is taking place spontaneously, seeking to ensure protection monitoring throughout
- Organise, in co-operation with NGOs and other agencies, the transportation and reception of returnees, provided that such arrangements are necessary to protect their interests and well being
- Monitor the status of returnees in their country of origin and intervene on their behalf if necessary.

At the end of 2006, the largest repatriation movement was to Afghanistan where 388,000 Afghan refugees chose to return home from neighbouring countries. The next largest repatriation movement was to Liberia where 108,000 refugees returned home.

The increasing emphasis of the UNHCR in the last decade on voluntary repatriation as a solution has meant those refugees are often returned against their will.

For instance, take the case of the repatriation of Rohingya refugees from Bangladesh. It has raised a good deal of controversy. In 1992, ‘beatings and other forms of abuse were used to encourage the refugees to change their intransigent attitude towards repatriation’. The allegations of coerced repatriation have been confirmed by independent observers.

The national law should, therefore, provide that no refugee would be returned against his or her will.

Where return has been voluntary there needs to be thought given to devising effective mechanisms to ensure that the state of origin live up to the promises which it had made
Ameliorative Mechanisms

in order to persuade refugees to return. Thus, the “Chakma” refugees who returned from India to the Chittagong hill tracts in Bangladesh found that the government did little to give them back their lands, or to provide them with enough resources to guarantee a minimum standard of life.

While UNHCR has in the past played an important role in monitoring the welfare of returnees, it is no longer effective given its policy preference of encouraging repatriations.

Allowing Local integration

The solution of local integration is unpopular with states in the region. According to Muntarbhorn, this was out of the question in most countries of the Asian region unless there were specific ethnic and religious links.

This was also hampered by the local population, who were affected by mass influxes and who took offence at the material assistance accorded to asylum-seekers which was at times of a higher standard than that received by the local population.

The solution needs greater attention of researchers, the UNHCR, and the international community of states in order to identify situations in which local integration is an appropriate solution and in defining the conditions in which meaning of ‘local integration’ may be said to have been realized.

The concept of open relief centres (ORCs)

Under the protection of UNHCR open relief centre established in Sri Lanka.

As on 1st January, 1997 20,429 internally displaced persons were accommodated in the two acre in northern Sri Lanka.

The centres operate on the principle that basic necessities such as shelter, food, sanitation, and medical care are provided for displaced persons, who are free to move in and out at will.

The open nature of the centres means that the surrounding population can seek safety whenever it feels threatened, and leave when the situation improves.

The problem of statelessness

An important question which needs to be addressed concerns the problem of stateless persons in the region. For, among other things, the problem of disputed nationality is a major obstacle in the process of repatriation.

For example, there are four large groups of stateless persons in the South Asian region: Rohingyas from Myanmar, Bihari Refugees from Bangladesh, Lhoutsampa refugees from Bhutan, and “Chakma” refugees in India.

A stateless person has been defined in international law as one ‘who is not considered as a national by any state under the operation of its law’. But this definition is confined to what are termed dejure stateless person.

No country of Asia is a member of these conventions. They should be persuaded to become parties, as the UDHR puts it, ‘everyone has a right to a nationality’ and that ‘no one shall be arbitrarily deprived of his nationality’.

In addition states in the region need to respond to the call of the Executive Committee of the UNHCR which in 1995 adopted conclusion No. 78 (XLVI) requesting states ‘to adopt nationality legislation with a view to reducing statelessness, constituent with
fundamental principles of international law, in particular by preventing arbitrary deprivation of nationality, an by eliminating provisions which permit the renunciation of a nationality without the prior possession of another nationality.

Resettlement

Some refugees cannot or are unwilling to return home, usually because they would face continued persecution.

Many are also unable to integrate locally for a variety of reasons. In such circumstances, UNHCR helps to permanently resettle refugees in a third country. On resettlement, the refugee normally becomes a citizen of that country after having fulfilled the criteria for naturalisation. Resettlement as a permanent solution means refugee status ceases.

Resettlement is also an important protection tool, addressing the protection and special needs of a refugee that cannot be met adequately in the country of asylum. A categorisation of such needs include women-at-risk, family reunification needs, unaccompanied or separated children, and refugees with medical needs. Under normal circumstances refugees cannot request for resettlement to a particular country. But in the interests of family reunification, refugees may request resettlement in countries where their immediate family members are living. Less than 20 nations world-wide participate in UNHCR resettlement programs and accept quotas of refugees on an annual basis. UNHCR submits cases (refugees) for resettlement based on its own criteria – protection needs, or most appropriate durable solution – but the final decision of whether or not to accept a refugee for resettlement, is made by the resettlement country, not UNHCR. Countries that have traditionally participated in the resettlement program include Australia, Canada, Denmark, Finland, New Zealand, Norway, Sweden, the Netherlands and the USA. Newer resettlement countries include the UK, Chile, Benin, Burkina Faso, Brazil, Ireland and Iceland. Other countries may consider submissions from UNHCR on a case by case basis, normally because of family reunion or strong cultural links. People facing particular problems or continued threats to their safety in their first asylum countries are foremost among those who can benefit from resettlement. In some cases it is an essential life-saving option – or the only way to save a particular refugee from having to resort to desperate measures (one unfortunately common example is the rape victim who has been rejected by her family and society, and has nowhere else to turn).

Some very specific refugee populations are also on occasion beneficiaries of group resettlement programmes. In 2006, refugees from Myanmar were the largest group globally to benefit from resettlement with 5,700 being transported to a new life outside their first asylum countries, followed by Somalis (5,200), Sudanese (2,900), refugees from the Democratic Republic of the Congo (2,000), and Afghans (1,900).

Burden sharing

Principle of burden sharing should given a global and not a regional interpretation.

The additional principles adopted are:

The refugee phenomenon continues to be a matter of global concern and needs the support of the international community as a whole for its solution and as such the principle of burden sharing should be viewed in this context.

The principle of international solidarity and burden sharing needs to be applied progressively to facilitate the process of durable solutions for refugees whether within or outside a particular region, keeping in perspective that durable solutions in certain
situations may need to be found by allowing access to refugees in countries outside the region due to political, social, and economic considerations.

The principle of international solidarity and burden sharing should be seen as applying to all aspects of the refugee situation, including the development and strengthening of the standards of treatment of refugees, support to states in protecting and assisting refugees, the provision of durable solution and the support of international bodies with responsibilities for the protection and assistance of refugees.

International solidarity and cooperation in burden sharing should be manifested whenever necessary, through effective concrete measures in support of states requiring assistance, whether through financial, or material aid, or through resettlement opportunities.

**18.10 MAKING UNHCR RESPONSIBLE IN LAW**

There have been charges, both in the region and elsewhere that the UNHCR has often acted in a manner which has led to the violation of the rights of refugees in the region.

For example, it has been accused of promoting the involuntary repatriation of Rohingya refugees from Bangladesh to Myanmar. It has also been charged with reducing the assistance given to refugees under its charge. Thus, for example it is said to have reduced assistance to Afghan urban refugees in New Delhi who now face difficult times.

Further study of these situations would be necessary before it can be stated with certainty whether these charges are correct. Where such charges are found to be well founded however, the UNHCR needs to be made responsible for its acts of omission and commission.

Thus, UNHCR should be held responsible if it incorrectly declares that a source state is safe for return, closes a camp and permits or facilitates the repatriation of the refugee population who suffer persecution on return.

**18.11 SUMMARY**

- Concluding, it would be fair to say that UNHCR’s promotional activities are wide-ranging and attempt to reach out to a diverse population, with the intention of creating an awareness on refugees concerns, promoting refugee law and refugee protection that are guided by international standards and norms.

**18.12 TERMINAL QUESTIONS**

1) Evaluate the Protection given to refugees by UNHCR.

2) What is the need to have a National refugee regimes in every country in South Asia?

**18.13 ANSWERS AND HINTS**

Self Assessment Questions

1) Refer to Section 18.3

2) Refer to Section 18.4

3) Refer to Section 18.5

4) Refer to Section 18.6

5) Refer to Section 18.8
Terminal Questions

1) Refer to Section 18.3 and 18.4

2) Refer to Section 18.5 and 18.6

18.14 GLOSSARY

Non refoulement: No return to domicile country. It is a principle of refugee law.
UNIT 19 WHAT IS THE ROLE OF OTHER ORGANISATIONS IN SOUTH ASIA?

Structure
19.1 Introduction
19.2 Objectives
19.3 The Procedure of Implementation of IHL
19.4 Military Law Advisers
19.5 Penalty of Grave Breaches of IHL
19.6 Military Law of India
19.7 Protection of Emblem
19.8 IHL Training for Military Personnel
19.9 Recommendations
19.10 Summary
19.11 Terminal Questions
19.12 Answers and Hints
19.13 Glossary
19.14 References and Suggested Readings

19.1 INTRODUCTION

In the expression of other organisations, we will discuss the “Military Law Mechanism” for international humanitarian law implementation.

As we know that IHL refers to Protocols 1977, together with other rules designed to ensure protection and respect of human beings in armed conflict. Implementation covers all those measures which must be taken to ensure that the provisions of IHL are fully respected. In other words we can say, implementation humanitarian law means putting this law into effect.

International humanitarian law (IHL) consists of international prescriptions on the conduct of combat and protection of victims of combat. Very important point with regard to IHL is that treaties themselves provide for a number of ways and means aimed at ensuring that their rules are observed if the situation requires their application.

Implementation of IHL may be carried out by the legal process by means of control and sanctions.

Military Law plays an active role in prevention by dissemination, designing regulatory measures, and by framing of desired rules and orders to ensure respect and adherence to IHL.

19.2 OBJECTIVES

After reading this unit, you should be able to:

- describe the Process of Implementation of IHL in Military organisation; and
- discuss the role of military Law Advisers.
19.3 THE PROCESS OF IMPLEMENTATION OF IHL

We look into the process for implementation in this chapter.

Generally, the process of implementation involves keeping a close watch not only on methods and means of warfare in order to assess their consequences in humanitarian terms, but also, on other developments that have a bearing on IHL. We can say, to prepare for the adoption, whenever necessary, of the new rules of that law.

These measures designed to assist other states to respect the law. It is obvious, that, these measures will assist particularly in peacetime, which may include providing legal advisers to assist in developing or adapting national legislation and penal codes for effective implementation of IHL.

It also assists to train legal advisers within the armed forces, teaching IHL as part of military co-operation, and so on.

When we say to respect for the law of war, it is a matter of order and discipline. A commander is required to assure that his subordinates are aware of their obligations under the IHL and that they respect them.

Additionally, we can say, the commander is expected to make sure that violations of the law of war cease and ensure that disciplinary or penal action is taken.

19.4 MILITARY LAW ADVISERS

Now, when we say, expert of military law, they are expected to assume the role of qualified training personnel. The High Contracting parties are called upon, during peace time, to train qualified personnel to facilitate the application of conventions and Protocols and in particular the activities of protecting powers.

These advisers may be employed to ensure that IHL provisions are not overlooked. They can be used to advise, instruct the commanders besides participating in general dissemination activities.

When we emphasising on legal advisers, the provision is Article 82 of Protocol I, the High Contracting parties at all times, shall ensure that legal advisers are available, to advise military commanders at the appropriate level on the application of the conventions and this Protocol and on the appropriate instruction to the armed forces on this subject. Obvious, this observation should be at that time when it is necessary.

We can articulate that it becomes the duty of the government concerned to utilise the services of legal advisers.

Duties legal advisers, superior commanders

This, we can say, another area in which the services and commanders stems from Article 86, Para 2 of Protocol I.

If we look the text, it is like, “The fact that a breach of the conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal, or disciplinary responsibility as the case may be, if they knew, or had information which should have enabled them to conclude, in the circumstances at time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.”
The officials of the Military legal department may be assigned a role together, i.e. to provide relevant information and provide legal opinion with regard to allegations about breaches.

The military commanders may also be tasked to organize consultations with experts to monitor and foster debate on the evolution of humanitarian issues.

The military commanders may rely mainly on the observations in the field to work on factual data. The role of military law, we can say, towards IHL implementation falls under the category of ‘national measures’.

The significance should be attached to imparting education to members of the armed forces rather than adopting coercive methods for law compliance. An educated soldier is less prone to commit breach of the conventions than a soldier who is ignorant about them. Military law experts have been actively associated in study on customary rules of IHL. These experts have focused their attention on efforts directed to prohibition of Anti-Personnel Land Mines, 1980, Conventional Weapons Convention, and the 1998 Rome Statute on the International Criminal Court, (ICC).

19.5 PENALTY OF GRAVE BREACHES OF IHL

Particularly, Grave breaches of IHL may be described as acts which constitute violations of the GC or Protocols are defined as grave breaches by these treaties. When we say grave breaches, it is obvious, that it should be focused on Articles 50, 51, 130, and 147 of the four Geneva Conventions of 1949 respectively, as well as Articles 11, Para 4 and 85 of Protocol I.

These above mentioned Articles are consists of attacks against the life or the physical integrity of persons protected by the conventions of 1949. Grave breaches of humanitarian law are assimilated to war crimes.

If we see profundity, there are number of indirect modes in which military law provisions can be invoked to facilitate implementation of IHL. These provisions may be illustrated by the different contingencies where recourse to the Army Act, 1950. If we see, an order from a superior commander to his subordinate to conduct classes aimed to disseminate IHL syllabi will be a lawful command, disregard to which may constitute disobedience of lawful command.

Similarly, an omission on the part of a student to attend such a class will amount to a culpable act of being absent without leave. The violations of breaches, other than grave breaches, would be punishable under Section 63 of the Army Act that concerns an act or impropriety prejudicial to good order and military discipline.

Self Assessment Question

1) Write the main provisions relating to grave breaches at Geneva Conventions 1949.

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Now we will focus on the military law in India, to implement IHL.

As we know, that, India has maritime boundaries with Bangladesh, Malaysia, Maldives, Myanmar, Pakistan, Sri Lanka and Thailand.

We also know, there have been a number of wars fought on the Indian subcontinent since it attained independence fifty-five years ago. And casualty figures of the two opposing sides during these armed conflicts and the proxy war exceed millions.

So we can say, Indian armed forces have a visible and real concern for understanding and adherence to the conventions and Protocols.

The Indian parliament has legislated the Geneva Conventions Act in 1960 pursuant to the constitutional sanction to give effect to the treaties and conventions to which India was a party. And as a result of this, the principles of IHL have been incorporated into the law of the country and the conventions form an integral part of Indian law.

If we look Section 7 of the Act, 1960 is relevant for the purpose of military law. It provides, 'The Army Act, 1950, the Air Force Act, 1950 or the Navy Act, 1957, relating to trial by court martial of persons who commit civil offences shall have effect for the purpose of the jurisdiction of courts martial as if this chapter had not been passed'.

If we observe the Military law, it mainly comprises of the Army Act, 1950, the Air Force Act, 1950 and the Navy Act, 1957. The basic framework of these enactments is almost identical. In addition, the Ministry of Defence exercises operational control over the Assam Rifles and the Coast Guard which is regulated by the Coast Guards Act, 1978.

If we notice the Central police Organizations commonly referred as the Central Paramilitary Forces (CPMF) are represented by the Border Security Force (BSF), Central Industrial Security Force (CISF), Central Reserve Police Force (CRPF), Indo-Tibetan Border Police (ITBP), and the National Security Guard (NSG), each of these components functions under their own statute.

If we study the constitution of India, Union list of the Seventh Schedule, which recognizes other, armed forces of the Union. The Human Rights Act, 1993, defines armed forces to include ‘other armed forces of Union’.

During the war, the CPMF, when deployed on borders or in war affected areas may be placed under Army’s operational control and would then be treated as assimilated to armed forces. In a limited way in the western and northern sectors, along the line of control, paramilitary forces have been deployed for a long time under Army’s operational control. In such situations they are obliged to comply with IHL provisions as their soldiers assume the status of combatants under law of war.

A significant feature of the military law relates to concurrent jurisdiction. Even combatant is subject to the provisions of law framed for his service. And at the same time he does not cease to be subject to the law of the land which applies to the others and to common citizens. If we see the Section 69 of the Army Act, which provides for trial and punishment of any person subject to the Army Act, for commission of any civil offence. The said Section itself provides for trial of civil offences. By virtue of this Section, any civil offence which is triable by a criminal court is akin to an offence under the Army Act. And therefore a grave breach of the conventions, if it amounts to an offence under any other penal law, can made a subject-matter for a trial by court martial.
Military law and criminal justice delivery system

Military law provisions present a practical and effective mechanism to ensure implementation of law of armed conflict. The utility of military law and its efficacy single it out as an effective mode to enforce the IHL.

This can be made use of both in a direct manner and also by implication or in an indirect mode. It emerges as a potent and simple tool for fair, prompt, and inexpensive disposal of cases pertaining to IHL violations. Military tribunals are characterized by speedy and impartial trials. They provide a wide variety of rules to cater for diverse situations, say for disregarding grave breaches liable to attract award of death penalty, or matters warranting joint trial of a large number of offenders. As regards prevention and detection of crime, military law apparatus recognizes the presumption of innocence and the right to a fair trial. The right to privacy is also suitably enshrined.

When we talk about a trial by court martial, it is invariably economical. The witnesses are unlikely to be influenced, or intimidated. Generally, they are rarely turned hostile. It has elaborate procedures for the pre-trial detention and subsequent confinement within the military structure in the form of detention cells, and military prisons. It has a unique advantage of presenting a correctional facility where convict is kept away from the possibility of becoming a hardened criminal in the company of jail inmates.

Usually a civilian may not find himself in a position to commit a war crime. The breaches would relate to situations of armed conflicts, or to actual war. Nuances of evidence pertaining to matters like command responsibility, military necessity, or use of excessive force may not be easily appreciated and understood by civilian judges unfamiliar with military ethos.

Military law as one of the law enforcement agencies, is strictly hierarchical and a closed system. As an organisation it usually operates under a rigid chain of command with strict separation of power and authority. The decision making process are of the ‘top down’ variety.

Apprehension is sometimes expressed about the fairness of military law mechanism to prosecute IHL violations. Such fear is based on the ground of protectionism. It is argued that protection afforded by Section 45 and 197 of the criminal procedure code may shelter the men in uniform from being called upon to answer charges of criminal prosecution.

Such a fear was discounted by the Supreme Court in Naga people’s case.

The court only gives protection in the form of previous sanction of the central government before a criminal prosecution, or a suit, or other civil proceeding is instituted, against such a person. It has to be borne in mind that discretionary power is not necessarily a discriminatory power and that abuse of power is not to be easily assumed where discretion is vested in the government and not in a minor official.

While holding trials, the necessity to conceal and protect the identity of victims, or military tactics can ensured. The results are different when trials are held in the civilian courts. For example, in regard to allegations about atrocities by the BSF, it was remarked, ‘a large number of cases have been registered against BSF personnel for having taken part in encounters or killed people. Whenever we have been able to identify civilians or militants, adequate action has been taken. It is the weakness of the criminal justice, administration system- that they are not able to quickly bring them to justice, or to punish them the way we would like.'
If we see the Article 91 of Protocol I envisage the concept of payment of compensation. It provides: ‘A party to the conflict which violates the provisions of the conventions, or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces. Thus, quasi-civil sanctions may be imposed on a state to pay compensation for the damage it has caused. Recourse to order payment of compensation is meant to complement the mechanism of penal prosecution.

The supreme court of India in the Naga people’s case paved the way for initiation of criminal action against the offenders while simultaneously giving monetary relief to the victims.

International committee of the Red Cross endeavours to provide protection and assistance for victims of armed conflict. The process of national implementation involves a constructive and continuing debate amongst the representatives of various ministerial, civil defence bodies, academicians, and other interested groups like media, and NGOs.

The meetings are generally held in close cooperation with the ICRC and the national societies. This facilitates progress towards domestic legislation to implement the LOAC.

Now, we can say that the Indian armed forces have taken concrete steps for implementation of the dissemination of knowledge on international humanitarian law by making it an essential component of the basic training given to each and every soldier.

Self Assessment Question
2) Explain Article 91 of the Protocol I.

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19.7 PROTECTION OF EMBLEM

According to the IHL provisions the use of the emblems of Red Cross or Red Crescent outside the conditions provided for by the humanitarian law is forbidden. Military law provides authority to the commanders to introduce legal measures for protection of the emblem of the Red Cross and Red Crescent.

19.8 IHL TRAINING FOR MILITARY PERSONNEL

Military law is inextricably linked to humanitarian law in the matter of training for the defence forces. Directors of military training of nearly all countries in South Asia have sought the expertise of the ICRC to structure their training programmes. National seminars, workshops, and capsules are organized to encourage greater awareness of the IHL.

The Institute of Military Law (IML), Kamptee, near Nagpur acts as the nodal training centre for training in LOAC. Under the overall guidance of the Judge Advocate General suitable exposure is given to the IHL contents in the training courses and promotion exams. Military law journal, a bi-annual publication brought out by the IML carries Articles on issues relevant to the law of war.
It carries out a singularly significant function of collection and analysis of all information relating to new legislation and case-law. One of the steps presently under active consideration of the JAG’s department is production of a training film to propagate the essential message of IHL.

**Generally,** all soldiers deployed in the disturbed areas are expected to carry the one page manual in their pocket. They are duty-bound to abide by its contents in letter and spirit.

The Supreme Court had commented on its legality in *Naga People’s case.*

When rules themselves do not contain any guidelines, directions, or criteria, the instructions issued by the government furnish an essential and statutory procedure for the purpose of securing uniformity in application of the rules. These instructions really fill up the yawning gaps in the provisions and are embedded in the conditions of service.

These are the binding on the government and cannot be violated to the prejudice to the government servant.

### 19.9 RECOMMENDATIONS

A number of steps may facilitate implementation of IHL to be more effective. The suggested recommendations listed below may bring about overall refinement of military law as an option for the prosecution of IHL violations:

Law governing the Army, Navy, and the Air Force could be suitably amended so that effective penalties are prescribed by way of penal sanctions for breaches of the conventions by bringing them within the list of military offences. Appropriate provisions should be inserted in the model law to be drafted, so that such breaches could relate to the offences with regard to refugees, hostages, and civilians, etc. an omnibus *Section* could be inserted to cover breaches of Geneva Conventions and the *Protocols.* The heading of such a *Section* may read as violations of IHL provisions.

Specific penalty should be allotted for each of the grave and other breaches. The punishments laid down for various breaches should have a similarity as regards those suggested by the conventions and also in the national legislations enacted by various states for uniform implementation of humanitarian laws.

More precise and common rules relating to attempt, abetment, and conspiracy need to be adopted.

The training of the armed forces in IHL should be given an added emphasis. IHL is applied by soldiers from the highest rank of the general down to the lowest sappy.

Dissemination should be carried out in national languages and the texts translated in Hindi so that they can be applied by the population and be easily understood.

The ICRC advisory service could play a coordinating role in this regard. Particular care needs to be taken with regard to the drafting of the text. These manuals would present an opportunity to include national interpretations of various issues. Military lawyers would then be able to suitably advise commanders at the appropriate level on the application of conventions, and about the laws of armed conflict.

### 19.10 SUMMARY

- Generally, the process of implementation involves keeping a close watch not only on methods and means of warfare in order to assess their consequences
inhumanitarian terms, but also, on other developments that have a bearing on IHL.

- Military advisers may be employed to ensure that IHL provision are not overlooked. They can be used to advise, instruct the commanders besides participating in general dissemination activities.

- Grave breaches of IHL may be described as acts which constitute violations on the GC or Protocols are defined as grave breaches by these treaties. When we say grave breaches, it is obvious, that it should be focussed on Articles 50, 51, 130 and 147 of the four Geneva Conventions of 1949 respectively, as well as Articles 11, Para 4 and 85 of Protocol I.

- The Indian parliament has legislated the Geneva Conventions Act in 1960 pursuant to the constitutional sanction to give effect to the treaties and conventions to which India was a party. And as result of this, the principles of IHL have been incorporated into the law of the country and the conventions form an integral part of Indian law. Military law also provides authority to the commanders to introduce legal measures for protection of the emblem of the Red Cross and Red Crescent. Directors of military training of nearly all countries in South Asia have sought the expertise of the ICRC to structure their training programmes. National seminars, workshops and capsules are organised to encourage greater awareness of the IHL.

19.11 TERMINAL QUESTIONS


2) In your opinion what should be done to implement IHL smoothly?

19.12 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Section 19.5

2) Refer to Section 19.6

Terminal Questions

1) Refer to Section 19.4 and 19.6

2) Refer to Section 19.9

19.13 GLOSSARY

LOAC : Law of War or Law of Armed Conflict

19.14 REFERENCES AND SUGGESTED READINGS

